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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No. ~~128~~ 102.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE, AND ARTHUR P. HEINZE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

FILED MAY 21, 1901.

(18,174.)

(18,174.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 19, 1901.

1 Pleas before the Honorable Hiram Knowles, judge of the district court of the United States for the district of Montana, sitting in the circuit court of the United States for the district of Montana, within the ninth judicial circuit, at the February term, 1901, thereof.

2 Be it remembered that on the 29th day of March, 1898, the plaintiff herein filed its amended complaint which said amended complaint is in the words and figures as follows, to wit:

3 In the Circuit Court of the United States, Ninth Circuit, District of Montana, Southern Division.

Boston and Montana Consolidated Copper and Silver Mining Company, Plaintiff, *vs.* Montana Ore Purchasing Company, F. Augustus Heinze, and Arthur P. Heinze, Defendants.	Complaint.

Now comes the above-named plaintiff by this its amended complaint, by leave of court first had and obtained, and complains of the above-named defendants, and for cause of action alleges:

That this plaintiff is now and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Butte city, Silver Bow county, in the State of Montana.

That the defendant, The Montana Ore Purchasing Company, is now and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Montana with its principal place of business at Butte city, in Silver Bow county, in the State of Montana.

That the defendants F. Augustus Heinze and Arthur P. Heinze are officers of the said defendant, Montana Ore Purchasing
4 Company, and in charge of its operations and affairs.

That at all times hereinafter mentioned the plaintiff was and now is the owner of that portion of that certain quartz lode mining claim, situated in Summit Valley mining district in Silver Bow county in the State of Montana, and known and called the Pennsylvania Lode claim, lot number 172, in township three, north of range seven west, principal meridian for Montana, and which is particularly bounded and described as follows, to wit:

Beginning at corner number one, from which the quarter-section corner on north boundary of section eighteen in township three north of range seven west of the principal meridian Montana, bears north three degrees fifty-seven minutes west, seven hundred and thirteen (713) feet distant, and corner number three of lot number 64, the St. Lawrence Lode claim, and corner number 2 of lot number 126, the Little Ida Lode claim, bear north eighty-three degrees ten minutes east, four hundred and forty-nine (449) feet distant. Thence first course, magnetic variation 19 degrees 45 minutes east, south

88 degrees 15 minutes east 56 feet to a point on east end line of lot 147, the Rob Roy Lode claim; for point of intersection of said lots 147 and 172, from which corner number 5 of said lot 147 bears south 11 degrees east, two hundred and ninety-six (296) feet distant; one thousand five hundred (1500) feet to corner number two. Thence second course, magnetic variation 20 degrees east, south 4 degrees 30 minutes west 564.6 feet to a point on north boundary line of mineral application 722, a placer claim, from which the northwest corner of said mineral application 722, which is also the northeast corner of mineral application 686, a placer claim, bears west 183.9 feet distant; six hundred (600) feet to corner number three. Thence third course, magnetic variation 20 degrees, east, north 88 degrees 15 minutes west 181.3 feet to a point on the west boundary line of said mineral application number 722, and east boundary line
5 of said mineral application 686; from which the northwest corner of said mineral application 722 and the northeast corner of said mineral application 686 bears north 29.8 feet distant, nine hundred and twenty-four (924) feet to a point over a tunnel, from which the mouth of said tunnel bears south 58 feet distant, eleven hundred and fifty-six and two-tenths (1156.2) feet to a point on the north boundary line of said mineral application 686, from which the northeast corner of said mineral application 686 bears east 974.4 feet distant, fifteen hundred (1500) feet to corner number four, from which the southwest location corner bears south four degrees 30 minutes west 48 feet distant discovery shaft bears north 70 degrees 30 minutes east 827 feet distant; corner number five of said lot 147 bears north 27 degrees 30 minutes east 344 feet distant, and corner number three of lot 146, the Grant Extension lode, bears south 36 degrees 45 minutes west 152 feet distant. Thence fourth course, magnetic variation 20 degrees east, north 4 degrees 30 minutes east 325 feet to a point on south side line of said lot 147, for point of intersection of said lots 147 and 172, from which corner number five of said lot number 147 bears south 82 degrees 4 minutes east 135 feet distant; six hundred feet to corner number one, the place of beginning. Expressly excepting and excluding herefrom all that portion of the ground heretofore described, embraced in said mining claim of lot number 147; also mineral applications number- 686 and 722; and also that portion of said Pennsylvania vein or lode, and also all veins, lodes or ledges throughout their entire depth, the tops or apexes of which lie inside of said excluded ground. Also excepting and excluding herefrom all that portion of the said above-described Pennsylvania Lode claim, described as follows, to wit: Beginning at the northeast corner of lot number 172 and running thence north
88 degrees 15 minutes west 130 feet; thence south 69 degrees
6 25 minutes east 136 feet; thence north 4 degrees 30 — east
44 feet to the place of beginning, and containing an area of $\frac{7}{10}$ of an acre of ground.

That heretofore, to wit, on or about the — day of —— 1895, the said defendants, wrongfully and unlawfully entered on and into the said premises hereinbefore described by underground workings and by tunnels, shafts, drifts, levels, and cross-cuts and ex-

tracted therefrom large quantities of valuable ores, containing copper, silver and other precious metals against the will, wish and consent of this plaintiff.

That by means of such underground workings, the said defendants have extracted from within the limits of this plaintiff's said premises hereinbefore described, one hundred and fifty thousand tons of ore, more or less and of the reasonable value of five hundred thousand dollars ($500,000.00) and have converted the same to their own use and have smelted and reduced the said ores and taken the proceeds thereof and converted the same to their own use.

That by reason of said trespasses this plaintiff has been damaged in the sum of five hundred thousand dollars, and that the said defendants have not paid the same or any part thereof.

That plaintiff did not discover the facts constituting the said trespass and did not know thereof until on or about the first day of December, 1896.

That the determination of the said controversy between the said plaintiff and the said defendants, involves the construction of title twenty-three, chapter VI of the Revised Statutes of the United States, concerning mines and mineral lands, in this, to wit:

That the said Pennsylvania Lode claim owned and claimed by the plaintiff, as hereinbefore alleged, is a mining claim duly located under the provisions of the statutes of the United States, relative to the appropriation of mineral lands and that the
7 same has been patented as a mining claim, under the provisions of said statutes.

That the said defendants own or claim to own a portion of that certain quartz lode claim, known as and called the Rarus Lode claim, lot number 179; and also a portion of that certain quartz lode claim known as and called the Johnstown Lode claim, lot number 173; and also a portion of the Little Ida Lode mining claim, lot number 126; and which said claims lie north of and partially adjoining and near to the said Pennsylvania Lode claim, on the north. That plaintiff is not acquainted with the metes and bounds of the said ground owned or claimed by the defendants.

That the said Rarus Lode claim, Johnstown Lode claim, and the Little Ida Lode claim, are mineral claims located under the laws of the United States relative to the appropriation and location of mineral lands and plaintiff is informed and believes and therefore alleges that the said claims or some of them have been patented by the United States to various parties, and that such patents were issued under and by virtue of the statutes of the United States, relative to the patenting of mineral lands upon the public domain.

That as plaintiff is informed and believes and therefore alleges, the said defendants claimed the right to enter upon the premises of this plaintiff, to wit, that portion of the Pennyslvania Lode claim above described, by reason of the fact that certain veins, owned or claimed by the defendants or in their possession have their tops or apexes within the ground owned or claimed as a part of the Rarus Lode claim, a portion of the Johnstown Lode claim, or a

portion of the Little Ida Lode claim, and that defendants assert the right to follow such veins on their downward courses or dips, although the same so far depart from a perpendicular as to depart from the ground owned or claimed by the defendants, and enter the premises owned or claimed by this plaintiff, to wit, that
8 portion of the Pennsylvania Lode claim hereinbefore described.

But plaintiff denies and disputes the fact that the said veins upon which the defendants have mined within the lines of the Pennsylvania Lode claim, even if such veins have their apices in defendants' ground, which plaintiff does not admit, are such veins as can be followed on their dip beyond the lines of the defendants' possessions and into the ground or premises of this plaintiff; but alleges the facts to be that the said veins are broken and intersected by faults in such a manner that the same cannot be traced or followed from the ground of the defendants into the Pennsylvania Lode claim and that therefore the said defendants have no right to enter upon the ground of this plaintiff, to wit, the said Pennsylvania Lode claim, for the purpose of extracting ores therefrom, by reason of their ownership of the apices of any veins within their ground.

And this plaintiff further shows that the veins upon which the defendants have been extracting ore within the premises of this plaintiff, if they or any of them have their apices on defendants' ground, which plaintiff does not admit, do not in their course or strike depart from the end lines of the defendants' claims or possessions, but that the same depart from the side lines of such claims in such a manner as to prohibit the said defendants from following the same beyond the said lines of their own possessions or claims, into plaintiff's portion of the said Pennsylvania claim.

That there are several veins which the defendants claim the right to follow on their dip beyond the side lines into the ground of this plaintiff, the said Pennsylvania Lode claim, but that neither of the said veins in their course or strike depart from the end lines of the said claim- or possessions of the defendants, if they have their apices within defendants' premises at all, but
9 plaintiff alleges that the ground claimed by the defendants was not so located or situated as to have any end lines whatever, as provided by the statutes of the United States in such cases, and that in pursuance of such fa'lure upon the part of the locator or locators of the ground or claims owned or claimed by the defendants, to mark the same with end lines parallel or to locate the same along the veins, but on the contrary having located the same across the veins, the said defendants have no extralateral rights in or to any of the veins in their said ground, and are not entitled to follow the same into or upon the ground of this plaintiff, the said portion of the Pennsylvania Lode claim.

And plaintiff further shows that a patent was issued by the United States to Stanislas E. Hirbous and others to that certain quartz lode claim known as and called the Rarus Lode claim,

hereinbefore referred to, a copy of which patent is hereto attached marked Exhibit "A" and made a part of this complaint.

And plaintiff further shows that a patent has been granted by the United States to William Harris, Sr., and others for that certain quartz lode claim known as and called the Johnstown Lode claim, a copy of which patent is hereto attached marked Exhibit "B" and made a part of this complaint.

And as showing that the questions involved in this controversy are questions arising under the statutes of the United States and involving the construction thereof, plaintiff shows and alleges that the said defendants herein claim to own a portion of the ground patented under both the said Johnstown and Rarus patents and that by virtue of said Rarus patent they, the said defendants, have acquired 1318 linear feet of what is designated and called the Rarus lode, and it is contended by the said defendants that under and by virtue of the said Rarus patent they and their predecessors in interest were granted 1318 linear feet to the Rarus lode,
10 extending from what is known as the east end line of the Rarus claim to an imaginary or projected line of the Rarus location.

And plaintiff further shows that the surface ground patented to the predecessors in interest of the defendants, to the Rarus Lode claim, does not include to exceed more than three hundred feet of the said Rarus lode, as shown in yellow shading on the map, attached to the Rarus patent, but that notwithstanding the fact that the surface ground granted by the said Rarus patent did not cover or extend over the said Rarus lode the defendants contend and claim that the said patent of the Rarus claim granted to them and their predecessors in interest the said Rarus lode beyond the surface ground granted by the Rarus patent and to the full extend of 1318 linear feet, and also contend and claim that by reason of the ownership of the said lode for the length aforesaid, and that by reason of the fact that the same passes through the east end line of the Rarus claim, as patented and the west end line of the original location of the said claim, that they are entitled to follow said veins on their course or dip into the earth and without the lines of the Rarus claim, both as originally located and as patented.

Plaintiff further shows that a large quantity of the ground which it is claimed by the defendants was originally included within the location of the Rarus claim, has been patented under the said Johnstown patent, hereinbefore referred to and as shown by the portion shaded in yellow on the plat attached to the said Johnstown patent. That notwithstanding that a portion of the Rarus location was patented under the Johnstown claim, the defendants contend and claim that only the surface ground of the Johnstown claim was patented to the patentees therein named and that all veins lying within the original location lines of the Rarus claim were patented to the claimant under the Rarus claim and that defendants are entitled to claim the said veins ex-
11 tending through the Johnstown patent under and by virtue

of the Rarus patent and that its extralateral rights should be determined by the Rarus and not by the Johnstown patent.

Plaintiff further shows that it disputes each and every one of the claims made by the defendants relative to the construction of said several patents and claims that all veins whose apexes lie within the Johnstown patent must be governed and regulated in extralateral rights, if any they have under the Johnstown patent and not under and by virtue of the Rarus patent.

And plaintiff further shows that the defendants claim that if they have no right to follow the veins within the lines of the original Rarus location, by virtue of the said Rarus patent, that they have a right to follow the same under and by virtue of the Johnstown patent, or the Johnstown and Rarus patents combined, under and beneath that portion of the Pennsylvania Lode claim belonging to this plaintiff; but opposed to this contention the plaintiff contends and insists that the defendants have no right to follow any vein having its apex either within the Johnstown or Rarus patents, under any circumstances, into or under the Pennsylvania Lode claim, at any point east of the intersection of the south side line of the Johnstown patent with the south side line of the original Rarus location.

And plaintiff further shows that the said defendants contend and claim that the plaintiff cannot under any circumstances obtain any relief for ores extracted within that portion of the premises owned by it without first showing that the apexes of the veins from which the ores were extracted are within the surface lines of the ground owned and claimed by the plaintiff, whereas, plaintiff claims that *prima facie* it is the owner of all ores found within its boundaries extended downward into the earth until it has been shown that some other person or company has some right thereto by reason of ownership of the apex of the vein within some other claim.

12 And plaintiff further shows that it is claimed by the defendants that the apex of the veins from which the ores in question were extracted, is divided, in that portion thereof as claimed by the defendants as upon the Rarus Lode claim, and a portion thereof upon the Johnstown Lode claim and a portion thereof upon the Pennsylvania Lode claim.

And defendants claim that by reason of the said divided apex that they may claim the right to follow the said vein beneath the surface and without the lines of the Rarus and Johnstown claims, under and by virtue of either or both of the said claims, at their election.

Plaintiff alleges that if any such vein as is claimed by the defendants exists that they have no extralateral rights by reason of the fact that the same has a divided apex.

Wherefore, plaintiff shows that there is involved in the matters in controversy, between plaintiff and the said defendants, the numerous questions aforesaid, which involve the construction of the statutes of the United States, relative to locating, purchasing and patenting of mineral lands and the construction of such statutes relative to the right of one claimant to follow veins down to and

into the premises of another, under the circumstances and situation of the parties as hereinbefore set out, and also the construction of said statutes in relation to patenting of claims and whether the vein can be patented to one person and the surface to another and to the right of the Land Department to segregate the surface from the mineral in the ground, granting one to one person and the other to another, and as to whether said action is authorized under and by virtue of said statutes, and also as to whether when an apex of a vein is divided upon the surface, part being within the premises granted in one patent and part within another, as to what, if any, extralateral rights are granted under such circumstances to either party.

13 Wherefore, plaintiff prays judgment against the defendants for the sum of five hundred thousand dollars and for costs of suit.

JOHN F. FORBIS,
Attorneys for Plaintiff.

STATE OF MONTANA, }
County of Silver Bow, } ss.

John F. Forbis, being first duly sworn on oath says: That he is the attorney for the plaintiff in the above-entitled action; that all of the officers of said plaintiff corporation are absent from the State and district of Montana, hence this verification by affiant; that affiant has read the foregoing complaint and knows the contents thereof and that the facts and matters therein stated are true of his best knowledge, information and belief.

JOHN F. FORBIS.

Subscribed and sworn to before me this 29th day of March, 1898.

[Seal Circuit Court.]

CHARLES W. BLAIR,
Deputy Clerk, United States Circuit Court,
Ninth Circuit, District of Montana.

14 EX. "A."

THE UNITED STATES OF AMERICA.

General Land Office No., 9457; mineral certificate No. 993.

To all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, there have been deposited in the General Land Office of the United States the plat and field-notes of survey of the claim of Stanislaus E. Hirbour, Joseph Ortyer, Eugene Fornier, Peter Tetrault, and the heirs of Michael Roy, deceased, upon the Rarus lode, accompanied by the certificate of the register of the land office at Helena, in the Territory of Montana, whereby it appears that, in pursuance of the said Revised Statutes of the United States, the said Stanislaus

E. Hirbour, Joseph Orytyer, Eugene Fournier, Peter Tetrault, and the heirs of Michael Roy, deceased, did on the twelfth day of May, A. D. 1883, enter and pay for said mining claim or premises, being mineral entry No. 993, in the series of said office, designated by the surveyor general as lot No. 179, embracing a portion of section eighteen (18) in township three (3) north of range seven (7) west of the principal meridian, in the Summit Valley mining district, in the county of Silver Bow and Territory of Montana, in the district of lands subject to sale at Helena, containing two and ninety-eight hundredths—$\frac{98}{100}$—acres of land, more or less and according to the returns on file in the General Land Office, bounded, described and platted as follows, with magnetic variations at twenty (20) degrees east, to wit: Beginning at corner number one, a granite stone 16 x 13 x 8 inches in size, marked "1, M. C. 79," from which corner number one of lot No. 113, patented to W. J. McNamara *et al.*, with their claim upon the Mountain View lode, bears south fifty-seven (57) degrees, fifty-seven (57) minutes west at the distance of one hundred and seventy (170) feet, and the quarter-section corner on north boundary of section eighteen (18) in township three (3) north of range seven (7) west, of the principal meridian, bears north eighty-five (85) degrees, eighteen (18) minutes forty (40) seconds west at the distance of seven hundred and eighty-four and one-tenth ($784\frac{1}{10}$th) feet; thence from said corner No. one south twenty-five (25) degrees, forty (40) minutes west, thirty-five (35) feet, to a granite stone 18 x 18 x 6 inches in size, marked "P. L. M. C. 126–179," situate on northerly boundary of lot No. 126, made for the Little Ida lode, seventy-two and five-tenths ($72\frac{5}{10}$ths) feet, to a granite stone 18 x 16 x 4 inches in size, marked "P. I. M. C. 173–179," situate on northerly boundary of lot No. 173, made for the claim of William Harris, Sr., *et al.*, upon the Johnstown lode, four hundred and twenty-two (422) feet to corner number 2, a granite stone 24 x 8 x 6 inches in size, with mound of stones, marked "2 M. C. 179," from which corner number one of said lot No. 126, the same being corner No. 2 of lot No. 64, patented to C. X. Larabie, with his claim upon St. Lawrence lode, bears north thirty-five (35) degrees, thirty-four (34) minutes west at the distance of two hundred and ninety (290) feet, and corner number one of said lot No. 173, bears north thirty-one (31) degrees, twenty-four (24) minutes west at the distance of three hundred and thirty-nine (339) feet; thence from said corner No. 2, south sixty-nine (69) degrees twenty-five (25) minutes east, two hundred and seventy-seven (277) feet to a granite stone 18 x 18 x 6 inches in size, marked "P. I. M. C. 126–179," situate on southerly boundary of said lot No. 126, from which corner number three of said lot No. 126 bears north seventy-two (72) degrees, fifty-two (52) minutes east at the distance of four hundred and eighty-two (482), seven hundred (700) feet, to a granite stone 22 x 8 x 6 inches in size, marked "P. I. M. C. 173–179," situate on southerly boundary of said lot No. 173, from which corner No. 3 of said lot No. 173, bears north eighty-five (85) degrees thirty (30) minutes east at the distance of five hundred and sixty-seven (567) feet, eight hundred and seventy-

one (871) feet, to a granite stone 18 x 7 x 4 inches in size, marked "P. I. M. C. 172–179," situate on northerly boundary of lot No. 172, made for the claim of William Harris, Sr., *et al.*, upon the Pennsylvania lode, from which corner number two of said lot No. 172, bears south eighty-eight (88) degrees, fifteen (15) minutes east, at the distance of one hundred and thirty (130) feet; number three shaft bears north fifteen (15) degrees west at the distance of
17 one hundred and ninety-one (191) feet, and number two shaft bears north twenty-two (22) degrees east at the distance of one hundred and thirty-two (132), ten hundred and seven (1007) feet, to a granite stone 20 x 12 x 4 inches in size, marked "P. I. M. C. 172–179," situate on easterly boundary of said lot No. 172, from which corner No. 2 of said lot No. 172 bears north four (4) degrees, thirty (30) minutes east at the distance of forty-four (44) feet, and discovery shaft bears north ten (10) degrees east, at the distance of one hundred and forty-three (143) feet, thirteen hundred and sixteen (1316) feet to corner number three, a granite stone 22 x 10 x 6 inches in size, marked "3 M. C. 179," from which corner No. 2 of said lot No. 172 bears north sixty-one (61) degrees, twenty (20) minutes west, at the distance of three hundred and twenty-one (321) feet; thence from said corner No. 3 north twenty-five (25) degrees, forty (40) minutes east, one hundred and twelve (112) feet, to a point from which the face of a tunnel bears north sixty-five (65) degrees west at the distance of eighty-seven (87) feet, four hundred and forty (440) feet, to corner number four, a granite stone 18 x 8 x 6 inches in size, marked "4 M. C. 179"; thence north seventy (70) degrees, nine (9) minutes, two hundred and forty-six (246) feet to a granite stone 20 x 8 x 5 inches in size, marked "P. I. M. C. 173–179," situate on easterly boundary of said lot No. 173, from which corner number three of said lot No. 173 bears south eight (8) degrees, thirty (30) minutes east, at the distance of two hundred and nineteen (219) feet,
18 seven hundred and sixty-eight (768) feet, to a granite stone 18 x 8 x 6 inches in size, marked "P. I. M. C. 126–179," situate on easterly boundary of said lot No. 126, from which corner number three of said lot No. 126 bears south eight (8) degrees, thirty (30) minutes, at the distance of one hundred and fifty (150) feet, eleven hundred and sixty-eight (1168) feet, to a granite stone 18 x 8 x 8 inches in size, marked "P. I. M. C. 173–179," situate on northerly boundary of said lot No. 173, from which the point of intersection of westerly boundary of this claim, with the northerly boundary of said lot No. 173, bears south eighty-five (85) degrees, thirty (30) minutes west, at the distance of one hundred and seventy-four (174) feet; twelve hundred and seventy-eight (1278) feet, to a granite stone 16 x 10 x 6 inches in size, marked "P. I. M. C. 126–179," situate on northerly boundary of said lot No. 126, from which the point of intersection of westerly boundary of this claim with the northerly boundary of said lot No. 126, bears south seventy-two (72) degrees west, at the distance of fifty-six (56) feet, thirteen hundred and eighteen (1318) feet, to the place of beginning, containing two and ninety-eight-hundredths (2_{100}^{98}ths) acres of land, more or less, and embracing thirteen hundred and eighteen (1318) linear feet of the

said Rarus lode, as represented by yellow shading in the following plat:

(Here follows map marked p. 19.)

20 Now know ye, that the United States of America, in consideration of the premises, and in conformity with said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said Stainlas E. Hirbour, Joseph Ortyer, Eugene Fournier, Peter Tetrealt, and the heirs of Michael Roy, deceased, and to their heirs and assigns, the said mining premises hereinbefore described as lot No 179, embracing a portion of section eighteen (18) in township three (3) north of range seven (7) west of the principal meridian, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of thirteen hundred and eighteen (1318) linear feet of the said Rarus vein, lode, ledge, or deposit for the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey; provided, that the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or
21 deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges, or deposits. Excepting and excluding, however, from these presents all that portion of the surface ground hereinbefore described, which is embraced by said lots Nos. 126, 172 and 173; and provided further, that nothing in this conveyance shall authorize the grantees herein, their heirs or assigns, to enter upon the surface of a mining claim owned or possessed by another. To have and to hold, the said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said Stainslas E. Hirbour, Joseph Ortyer, Eugene Fournier, Peter Tetrault, and the heirs of Michael Roy, deceased, and to their heirs and assigns forever, subject, nevertheless, to the following conditions and stipulations:

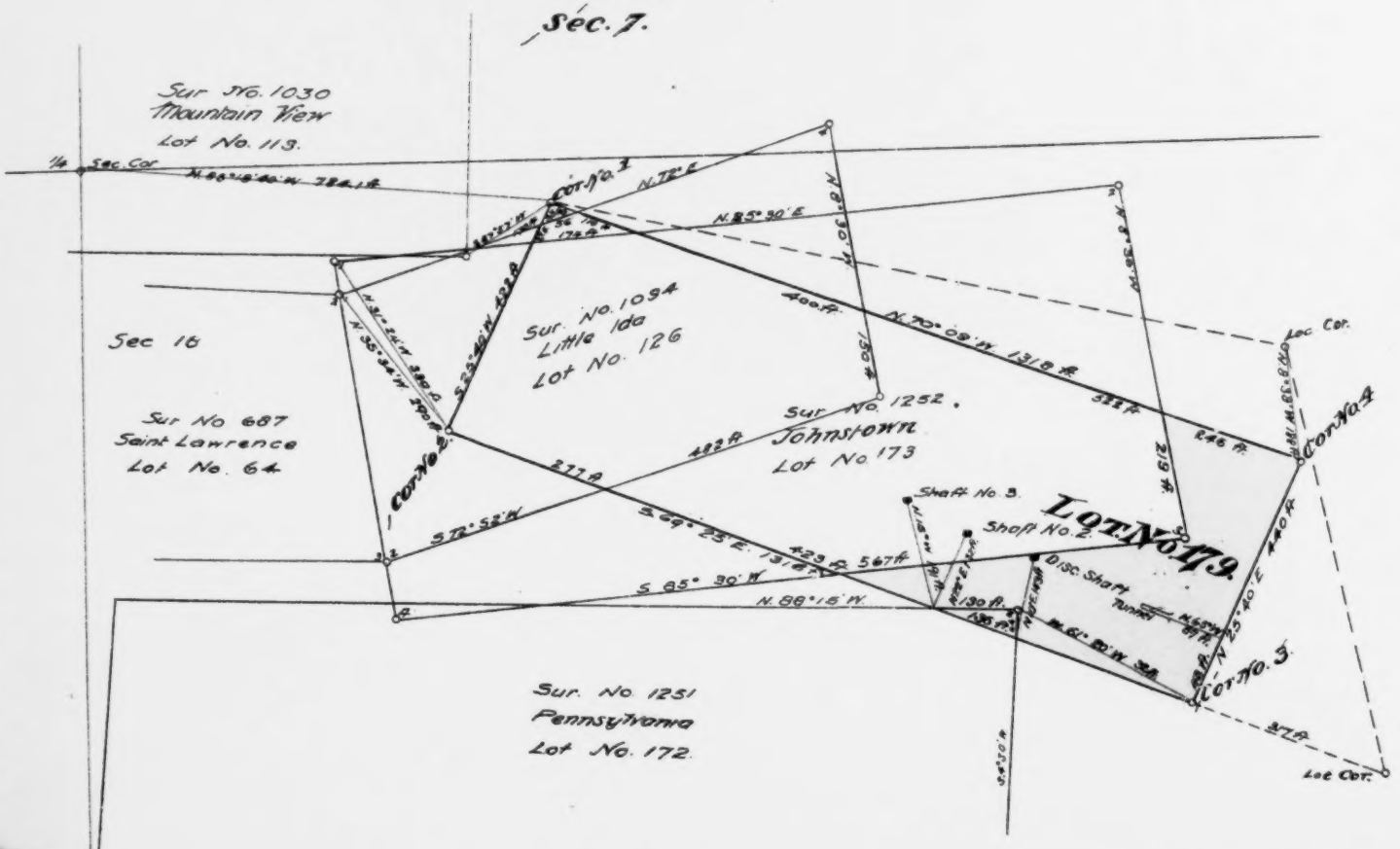
First. That the grant hereby made is restricted to the land hereinbefore described as lot No. 179, with thirteen hundred and eighteen (1318) linear feet of the Rarus vein, lode, ledge, or deposit for the length aforesaid throughout its entire depth as aforesaid, together with all other veins, lodes, ledges, or deposits throughout their entire depths, as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey.

22 Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any

Plat
of the Claim of
Stanislas E. Hirbour et. al.
UPON THE
Rarus Lode
Summit Valley Mining District, Silver Bow County
Montana.
Containing 2.98 Acres.
Scale 200 ft to an inch
Var 20° E.

No. 328
B B & M. C. Co's. M. Co } p. 19
M. O. P. Co's Cert.

T. 3 N. R 7 W.
Surveyed
Sec. 7.



other vein, lode, ledge or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge or deposit.

Third. That the premises hereby conveyed shall be held subject to any vested and approved water rights for mining, agriculture, manufacturing or other purpose, the rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts.

Fourth. That in the absence of necessary legislation by Congress, the legislature of Montana may provide rules for working the mining claims or premises hereby granted, involving easements, drainage and other necessary means to its complete development.

In testimony whereof, I, Chester A. Arthur, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the
23 twenty-fifth day of June, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States one hundred and eighth.

By the President,

CHESTER A. ARTHUR,
By W. H. COOK, *Secretary.*

[General Land Office Seal.]

S. W. CLARK,
Recorder of the General Land Office.

"Examined."

Recorded, vol. 112, pages 345 to 348, inclusive.

Filed for record, February 23rd, A. D. 1895, at fifty minutes past nine o'clock a. m.

C. Q. JOHNSON,
County Recorder,
By A. E. WHIPPS, *Deputy.*

STATE OF MONTANA, }
County of Silver Bow, } ss :

I, John Weston, county clerk and recorder of said county, do hereby certify that the annexed instrument is a full, true and correct copy of the original instrument, as recorded at page 190 in Book C of U. S. Patents, Records of Silver Bow County, Montana.

Attest my hand and the seal of said Silver Bow county hereunto affixed this 18th day of May, 1897.

JOHN WESTON,
County Clerk and Recorder,
By J. E. MORAN, *Deputy.*

24 EX. "B."

THE UNITED STATES OF AMERICA.

General Land Office No., 9893; mineral certificate No. 1012.

To all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, there has been deposited in the General Land Office of the United States, the plat and field-notes of survey of the claim of William Harris, Sr., William Harris, Jr., John E. Lloyd, Thomas E. Lloyd, Jeremiah Griffith, Thomas Griffith and John H. Davis, upon the Johnstown lode, accompanied by the certificate of the register of the land office at Helena, in the Territory of Montana, whereby it appears that, in pursuance of the said Revised Statutes of the United States, the said William Harris, Sr., William Harris, Jr., John E. Lloyd, David J. Lloyd, Thomas E. Lloyd, Jeremiah Griffith, Thomas Griffith and John H. Davis, did, on the first day of December, A. D. 1883, enter and pay for said mining claim or premises, being mineral entry number 1012 in the series of said office, designated by the surveyor general as lot No. 173, embracing a portion of section eighteen (18), in township three (3) north of range seven (7) west of the
25 principal meridian in the Summit Valley mining district, in the county of Silver Bow and Territory of Montana, in the district of land subject to sale at Helena, containing eighteen (18) acres of land, more or less, and according to the returns on file in the General Land Office, bounded, described and platted as follows, with magnetic variation- as hereinafter stated, to wit: Beginning at corner number one, a granite stone 19 x 10 x 6 inches in size, marked "I. M.C. 173," from which the quarter-section corner on north boundary of section eighteen (18) in township three (3) north of range seven (7) west of the principal meridian bears, with magnetic variation at twenty (20) degrees east, north sixty-nine (69) degrees, forty-nine (49) minutes, and twenty-seven (27) seconds west at the distance of four hundred and forty-nine and seven-tenths (449.7) feet, corner number two (2) of lot number one hundred and twenty-seven (127), the Smelter Lode claim bears north sixty-three (63) degrees east at the distance of two hundred and eighteen (218) feet, and corner number one of lot number one hundred and thirteen, the Mountain View Lode claim bears east at the distance of two hundred and twenty-three (223) feet; thence, from said corner number one, north eighty-five (85) degrees thirty (30) minutes east, seventy-three (73) feet to a granite stone eighteen by 8 by 6 inches in size, marked "P. I. M. C. 113–173," situate on southerly boundary of said lot No. 113, from which corner number one of said lot No. 113, bears south eighty-seven (87) degrees, thirty (30) minutes east at the distance of
26 one hundred and forty-five (145) feet and the point of intersection of the southerly boundary of said lot No. 113, to the northerly boundary of lot No. 126, the Little Ida Lode claim, bears

south eighty-seven (87) degrees, thirty (30) minutes east at the distance of one hundred (100) feet; two hundred and nineteen (219) feet to a granite stone 16 x 12 x 10 inches in size, marked "P. I. M. C. 113–126 and 173," situate on easterly boundary of said lot No. 113, and northerly boundary of said lot No. 126, from which corner number one of said lot No. 113, bears south two (2) degrees, thirty (30) minutes west at the distance of seventeen (17), eight hundred and fifty-seven (857) feet to a granite stone 16 x 6 x 5 inches in size, marked "P. I. M. C. 126–173," situate on the easterly boundary of said lot No. 126, from which corner number three of said lot No. 126, bears south eight (8) degrees thirty (30) minutes east at a distance of three hundred and sixteen (316) feet, thirteen hundred and seventeen (1317) feet to corner number 2 a granite stone 18 x 10 x 8 inches in size, marked "M. C. 173;" thence south eight (8) degrees thirty (30) minutes east six hundred (600) feet, to corner number three, a granite stone 26 x 12 x 6 inches in size, with mound of stones, marked "3 M. C. 173;" thence south eighty-five (85) degrees, thirty (30) minutes west, ten hundred and eighty-five (1085) feet to a granite stone 24 x 16 x 6 inches in size, marked "P. I. M. C. 172–173," situate on northerly boundary of lot No. 172, the Pennsylvania Lode claim, thirteen hundred and seventeen (1317) feet to corner number four a granite stone
27 30 x 12 x 10 inches in size with mound of stones, marked "4 M. C. 173," from which the face of a tunnel bears, with magnetic variation at nineteen (19) degrees, forty-five (45) minutes east, south six (6) degrees east at the distance of six hundred and thirty-nine (639) feet, and corner number one of said lot No. 172 bears north eighty-five (85) degrees, fifteen (15) minutes west at the distance of four hundred and sixty-one (461) —; thence from said corner number four, north eight (8) degrees, thirty (30) minutes west twenty-five (25) feet to a granite stone 18 x 8 x 6 inches in size, marked "P. I. M. C. 172–173," situate on northerly boundary of said lot No. 172, from which corner number one of said lot No. 172 bears north eighty-eight (88) degrees, fifteen (15) minutes west at the distance of four hundred and fifty-six (456) —, and the point of intersection of northerly boundary of said lot No. 172 with the southerly boundary of this claim, bears south eighty-eight (88) degrees, fifteen (15) minutes east at the distance of two hundred and thirty-five (235) feet; ninety-three (93) feet to corner number 3 of lot No. 64, the St. Lawrence Lode claim, and also corner number two, of said lot No. 126, from which corner No. 3 of said lot No. 126 bears north seventy-two (72) degrees, fifty-two (52) minutes east at the distance of eight hundred and sixty-five (865) feet, three hundred (300) feet to a point, from which discovery shaft bears north eighty-five (85) degrees, thirty (30) minutes east at the distance of two hundred and fifty (250) feet, five hundred and forty-six (546) feet to corner number two of said lot number 64, and also corner number
28 one of said lot No. 126, from which the point of intersection of the southerly boundary of said lot No. 113, with the northerly boundary of said lot No. 126, bears north seventy-two (72) degrees east at the distance of one hundred and seventy-four (174) feet,

and the point of intersection of the northerly boundary of said lot with the northerly boundary of this claim and easterly boundary of said lot No. 113, bears north seventy-two (72) — east at the distance of two hundred and twenty-two (222) feet; six hundred (600) feet to the place of beginning, containing eighteen (18) acres of land, more or less, and embracing thirteen hundred and seventeen (1317) linear feet of the said Johnstown lode, as represented by yellow shading in the following plat:

(Here follows map marked p. 29.)

30 Now know ye; that the United States of America, in consideration of the premises, and in conformity of the said Reivsed Statutes of the United States, have given and granted, and by these presents do give and grant unto the said William Harris, Sr., William Harris, Jr., John E. Lloyd, David J. Lloyd, Thomas E. Lloyd, Jeremiah Griffith, Thomas Griffith and John H. Davis, and to their heirs, and assigns, the said mining premises hereinbefore described as lot No. 173, embracing a portion of section eighteen (18) in township three (3) north of range seven (7) west of the principal meridian, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of thirteen hundred and seventeen (1317) linear feet of the said Johnstown vein, lode, ledge or deposit for the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey; provided that the right of possession hereby granted to such outside parts of said veins, lodes, ledges or de-
31 posits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges or deposits; excepting and excluding, however, from these presents all that portion of the surface ground hereinbefore described, which is embraced by said lots Nos. 113 and 172. And provided further, that nothing in this conveyance shall authorize the grantees herein, their heirs or assigns, to enter upon the surface of a mining claim owned or possessed by another; to have and to hold said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said William Harrris, Sr., William Harris, Jr., John E. Lloyd, David J. Lloyd, Thomas E. Lloyd, Jeremiah Griffith, Thomas Griffith and John H. Davis, and to their heirs and assigns forever, subject nevertheless to the following conditions and stipulations:

First. That the grant hereby made is restricted to the land here-

Plat

of the Claim of William Harris, Sr. et al upon the

Johnstown Lode.

Summit Valley Mining District, Silver Bow County, Montana.

Containing 18.00 Acres

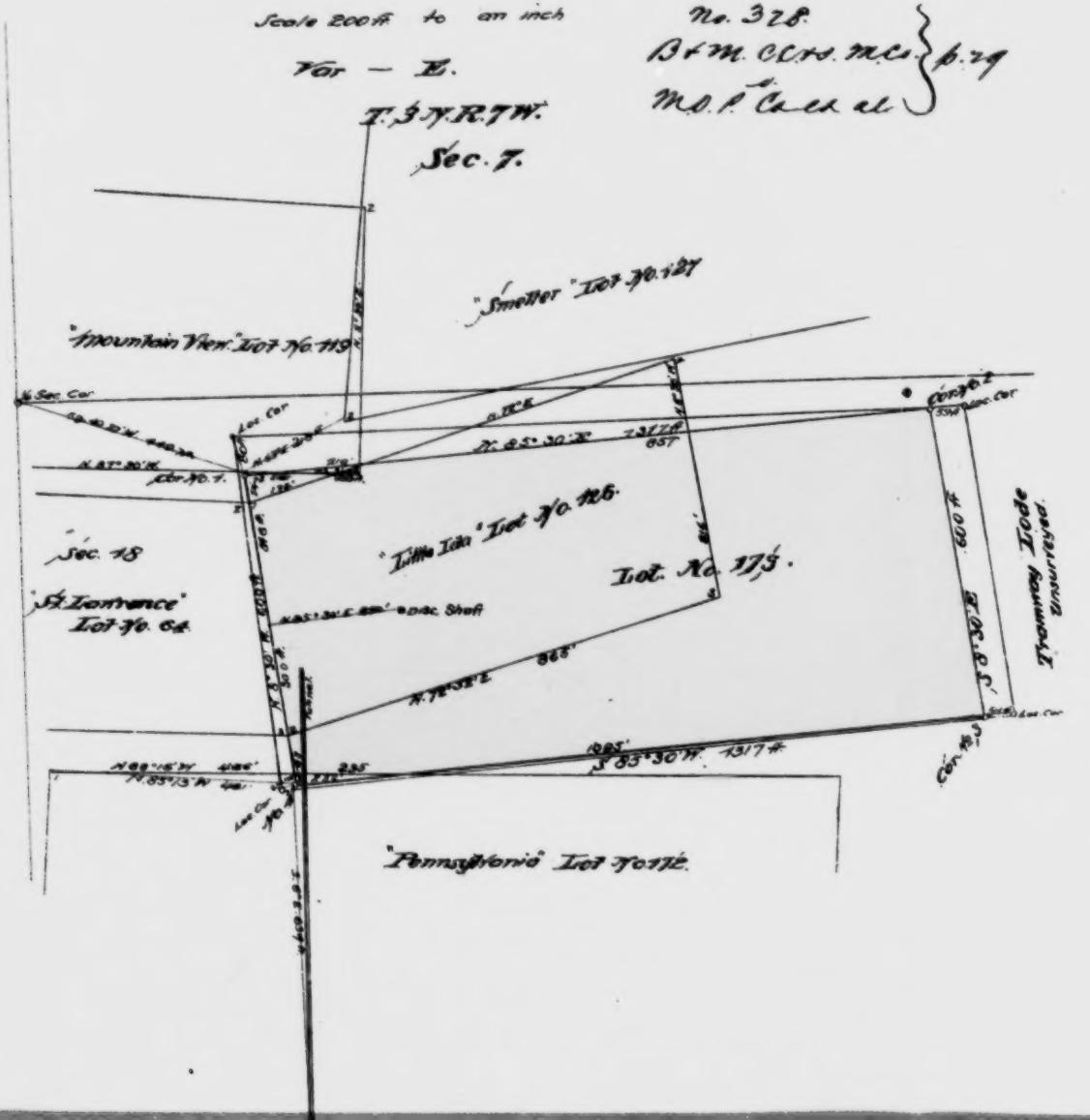
Scale 200 ft to an inch

No. 328.
B & M. Cons. M.C. } p. 29
M.O.P. Co. et al

For — E.

T. 3 N. R. 7 W.

Sec. 7.


"Smelter" Lot No. 127
"Mountain View" Lot No. 119
"Little Ida" Lot No. 126.
Lot. No. 173.
Sec. 18
"St. Lawrence" Lot No. 64
Thawville Lode
"Pennsylvania" Lot No. 116
N. 85° 30' E. 731.7 ft.
S. 85° 30' W. 1317 ft.
N. 85° 30' E. 868'
S. 85° 30' E. 600 ft.
N. 85° 30' E. 880'
N. 85° 30' E. 880'
N. 85° 30' E. 880'

inbefore described as lot No. 173 with thirteen hundred and seventeen (1317) linear feet of the Johnstown vein, lode, ledge or deposit for the length aforesaid, through its entire depth as aforesaid, together with all other veins, lodes, ledges or deposits, throughout their entire depths as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey.

32 Second. That the premises thereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect extend into or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge or deposit.

Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agriculture, manufacturing, or other purposes and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts.

Fourth. That in the absence of necessary legislation by Congress, the legislature of Montana may provide rules for working the mining claim or premises hereby granted, involving easement, drainage and other necessary means to its complete development.

In testimony whereof, I, Chester A. Arthur, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the fif-

33 teenth day of November, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

By the President,

CHESTER A. ARTHUR,
By M. McKEAN, *Secretary.*

[Seal of the General Land Office.]

S. W. CLARK,
Recorder of the General Land Office.

Recorded vol. 117, pages 329 to 333 inclusive. Examined. Filed for record March 12th, A. D. 1890, at five minutes past two o'clock p. m.

C. F. BOOTH,
County Recorder.

STATE OF MONTANA, }
County of Silver Bow, } ss:

I, John Weston, county clerk and recorder in and for said county and State, do hereby certify that the annexed instrument is a full, true, and correct copy of the original instrument as recorded at page 29 in Book B of U. S. Patents, records of Silver Bow county, Montana.

Attest my hand and the seal of said Silver Bow county hereunto affixed this 26th day of March, A. D. 1897.

JOHN WESTON,
County Clerk and Recorder,
By A. E. WHIPPS, *Deputy.*

34 Endorsed: (Title of court and cause.) Amended complaint. Filed March 29, 1898. Geo. W. Sproule, clerk by Charles W. Blair, deputy clerk.

And thereafter to wit on the 13th day of May, 1898, the defendants filed their demurrer to amended complaint which said demurrer is in the words and figures as follows to wit:

35 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING Company, a Corporation, Plaintiff,
vs.
MONTANA ORE PURCHASING COMPANY, a Corporation; F. Augustus Heinze, and Arthur P. Heinze, Defendants.

Demurrer to Amended Complaint.

Come now the above-named defendants and demur to the amended complaint of plaintiff on file herein, and for ground of demurrer state:

First. That the court has no jurisdiction of the subject-matter of this action.

Second. That it appears from the complaint that no Federal question is involved in the action, and that the controversy existing between the parties does not involve the construction of any statute or law of the United States.

Third. That the complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendants pray that said action be dismissed, and that they have judgment for their costs.

JOHN J. McHATTON,
Attorney for the Defendants.

I hereby certify that in my opinion this demurrer is well founded in point of law.

JOHN J. McHATTON,
Attorney for the Defendants.

Service of the above demurrer acknowledged and copy received this 13th day of May, A. D. 1898.

FORBIS AND EVANS,
Attorneys for Plaintiff.

36 Demurrer to amended complaint. Filed May 13, 1898. Geo. W. Sproule, clerk, by Chas. W. Blair deputy clerk.

And thereafter to wit, on the 22nd day of March, 1899, the following proceedings were had in said cause as follows to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING Company, a Corporation, Plaintiff,
vs.
MONTANA ORE PURCHASING COMPANY, a Corporation; F. Augustus Heinze, and Arthur P. Heinze, Defendants.

In open court.

This cause heretofore submitted to the court on demurrer herein came on regularly for decision, and thereupon it is ordered that the demurrer herein be and the same hereby is sustained and cause dismissed for want of jurisdiction herein.

And thereafter to wit on the 30 day of March 1899, a bill of exceptions was duly signed allowed and filed herein which is in the words and figures as follows, to wit:

37 In the Circuit Court of the United States, Ninth Circuit, District of Montana, Southern Division.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING Company, a Corporation, Plaintiff,
vs.
MONTANA ORE PURCHASING COMPANY, a Corporation; F. Augustus Heinze, and Arthur P. Heinze, Defendants.

This cause came on for hearing upon the demurrer of defendants Montana Ore Purchasing Company, F. Augustus Heinze, and Arthur P. Heinze, to plaintiff's amended complaint herein on file, and upon the application of said defendants to dismiss said action and the said demurrer having been submitted to and duly considered by the court, the court rendered its decision herein sustaining said demurrer and dismissing said action upon the ground and for the reason that there was no Federal question presented by the allegations in said amended complaint and that therefore this court had no jurisdiction in said action.

And to the ruling of said court in sustaining said demurrer and dismissing said action, plaintiff in this action duly excepted and asks the court to sign and seal this its bill of exceptions, which is done accordingly in open court, this 29th day of March 1899.

HIRAM KNOWLES, *Judge.*

Bill of exceptions Filed March 30, 1899. Geo. W. Sproule, clerk by Chas. W. Blair, dep. clerk.

38 And thereafter to wit on the 30th day of March 1899, a certificate of question on writ of error was made and entered herein in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana, Southern Division.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER Mining Company, a Corporation, Plaintiff,
vs.
MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS Heinze, and Arthur P. Heinze, Defendants. } No. 34.

Certificate of question of jurisdiction upon writ of error from the circuit court of the United States, ninth circuit, district of Montana, southern division, to the Supreme Court of the United States.

This cause coming on for hearing upon the demurrer of defendants, Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze, to plaintiff's amended complaint, on the ground of want of jurisdiction in this court to consider the same, and that there were no Federal questions presented by the allegations in said amended complaint, and upon the application of defendants, Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze, to dismiss said action upon the ground of want of jurisdiction in this court to consider the same, and that there was no Federal question presented by the allegations in said amended complaint, in said action, and the said demurrer and application having been submitted to and duly considered by this court, the said demurrer and application to dismiss was sustained for the reason and upon the ground that the court had no jurisdiction of said action, upon the facts stated in said amended complaint, and that there is no Federal question presented by the allegations in said complaint, and plaintiff being desirous of suing out a writ of error from the order and decree of this court in sustaining said demurrer and dismissing said action and having this day applied to this court for a certificate as required in such cases:

39

The court hereby certifies to the Supreme Court of the United States, for decision, the following question of jurisdiction, which has arisen upon said demurrer and application to dismiss, whether or not a Federal question is presented in the following allegations contained in plaintiff's amended complaint, which said allegations are as follows, to wit:

"That this plaintiff is now and at all the times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Butte, Silver Bow county, in the State of Montana.

That the defendant, The Montana Ore Purchasing Company is now and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State

of Montana, with its principal place of business at Butte city, in Silver Bow county, in the State of Montana.

That the defendants, F. Augustus Heinze and Arthur P. Heinze are officers of the said defendant, Montana Ore Purchasing Company, and in charge of its operations and affairs.

That at all the times hereinafter mentioned this plaintiff was and now is the owner of that portion of that certain quartz lode mining claim, situated in Summit Valley mining district, in Silver Bow county, in the State of Montana, and known as and called the Pennsylvania Lode claim, lot number 172, in township three
40 north range seven west, principal meridian for Montana, and which is particularly bounded and described as follows, to wit:

Beginning at corner number one, from which the quarter-section corner on north boundary of section eighteen, in township three, north range seven west of the principal meridian of Montana, bears north three degrees fifty-seven minutes west, seven hundred and thirteen (713) feet distant, and corner number three of lot number 64, the St. Lawrence Lode claim, and corner number 2 of lot number 126, the Little Ida Lode claim, bears north eighty-three degrees ten minutes east four hundred and forty-nine (449) feet distant. Thence first course magnetic variation, 19 degrees 45 minutes east south 88 degrees 15 minutes east, 56 feet to a point on east end line of lot 147, the Rob Roy Lode claim, for point of intersection of said lots 147 and 172, from which corner number 5 of said lot 147 bears south 11 degrees east two hundred and ninety-six (296) feet distant; one thousand five hundred (1500) feet to corner number two. Thence second course, magnetic variation, 20 degrees east south 4 degrees 30 minutes west 564.6 feet to a point on north boundary line of mineral application 722, a placer claim, from which the northwest corner of said mineral application 722, which is also the northeast corner of mineral application 686, a placer claim, bears west 183.9 feet distant, six hundred (600) feet to corner number three. Thence third course, magnetic variation, 20 degrees east north 88 degrees 15 minutes west 181.3 feet to a point on the west boundary line of said mineral application number 722, and east boundary line of said mineral application 686; from which the northwest corner of said mineral application 722 and the northeast corner of said mineral application 686 bears north 29.8 feet distant, nine hundred and twenty-four (924) feet to a point over a tunnel, from which the mouth of said tunnel bears south 58 feet distant, eleven hundred and fifty-six and two-tenths (1156.2) feet to a point on the north boundary line of said mineral application 686, from which the northeast corner of said mineral application 686 bears east
41 974.4 feet distant; fifteen hundred (1500) feet to corner number four, from which the southwest location corner bears south four degrees 30 minutes west, 48 feet distant, discovery shaft bears north 70 degrees 30 minutes east 827 feet distant, corner number five of said lot 147 bears north 27 degrees 30 minutes east 344 feet distant, and corner number three of lot 146, the Grant Ex-

tension lode, bears south 36 degrees 45 minutes west 152 feet distant thence fourth course, magnetic variation 20 degrees east north four degrees 30 minutes east 325 feet to a point on south side line of said lot 147, for point of intersection of said lots 147 and 172, from which corner number five of said lot number 147 bears south 82 degrees 4 minutes east 135 feet distant; six hundred feet to corner number one, the place of beginning. Expressly excepting and excluding herefrom all that portion of the ground heretofore described, embraced in said mining claim or lot number 147, also mineral applications number-686 and 722; and also that portion of said Pennsylvania vein or lode, and all veins, lodes or ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground. Also excepting and excluding herefrom all that portion of the said above-described Pennsylvania Lode claim, described as follows, to wit: Beginning at the northeast corner of lot number 172, and running thence north 88 degrees 15 minutes west, 130 feet; thence south 69 degrees 25 minutes east 136 feet; thence north 4 degrees 30 minutes east 44 feet to the place of beginning and containing an area of $\frac{7}{100}$ of an acre of ground.

That heretofore, to wit: on or about the — day of —— 1895, the said defendants wrongfully and unlawfully entered upon and into the said premises hereinbefore described by underground workings and by tunnels, shafts, drifts, levels and cross-cuts and extracted therefrom large quantities of valuable ores, containing copper, silver and other precious metals, against the will, wish
42 and consent of this plaintiff.

That by means of said underground workings the said defendants have extracted from within the limits of this plaintiff's said premises hereinbefore described, one hundred and fifty thousand tons of ore, more or less, and of the reasonable value of five hundred thousand dollars ($500,000) and have converted the same to their own use and have smelted and reduced the said ores and taken the proceeds thereof and converted the same to their own use.

That by reason of said trespasses this plaintiff has been damaged in the sum of five hundred thousand dollars, and that the said defendants have not paid the same or any part thereof.

That plaintiff did not discover the fact constituting the said trespass and did not know thereof, until on or about the first day of December, 1896.

That the determination of the said controversy between the said plaintiff and the said defendants, involves the construction of title twenty-three, chapter VI of the Revised Statutes of the United States, concerning mines and mineral lands, in this to wit:

That the said Pennsylvania Lode claim, owned and claimed by the plaintiff as hereinbefore alleged, is a mining claim, duly located under the provisions of the statutes of the United States, relative to the appropriation of mineral lands and that the same has been patented as a mining claim under the provisions of said statutes.

That the said defendants own or claim to own a portion of that certain quartz lode mining claim, known as and called the Rarus Lode claim, lot number 179, and also a portion of that certain

quartz lode claim known as and called the Johnstown Lode claim, lot number 173, and also a portion of the Little Ida Lode mining claim, lot number 126, and which said claims lie north of and partially adjoining and near to the said Pennsylvania Lode
43 claim, on the north. That the plaintiff is not acquainted with the exact metes and bounds of the said ground owned or claimed by the defendants.

That the said Rarus Lode claim, Johnstown Lode claim and the Little Ida Lode claim are mineral claims located under the laws of the United States, relative to the appropriation and location of mineral lands, and plaintiff is informed and believes and therefore alleges that the said claims or some of them have been patented by the United States to various parties, and that such patents were issued under and by virtue of the statutes of the United States, relative to the patenting of mineral lands upon the public domain.

That as plaintiff is informed and believes and therefore alleges the said defendants claim the right to enter upon the premises of this plaintiff, to wit: that portion of the Pennsylvania Lode claim, above described, by reason of the fact that certain veins owned or claimed by the defendants or in their possession have their tops or apexes within the ground owned or claimed as a part of the Rarus Lode claim, a portion of the Johnstown Lode claim or a portion of the Little Ida Lode claim, and that defendants assert the right to follow such veins on their downward course or dips, although the same so far depart from a perpendicular as to depart from the ground owned or claimed by the defendants and enter the premises owned or claimed by this plaintiff, to wit, that portion of the Pennsylvania Lode claim hereinbefore described.

But plaintiff denies and disputes the fact that the said veins upon which the said defendants have mined within the lines of the Pennsylvania Lode claim, even if such veins have their apices in defendants' ground, which plaintiff does not admit, are such veins as can be followed, on their dip beyond the lines of the defendants' possessions and into the ground or premises of this plaintiff; but
44 alleges the facts to be that the said veins are broken and intersected by faults in such a manner that the same cannot be traced or followed from the ground of the defendants into the Pennsylvania Lode claim, and that therefore the said defendants have no right to enter upon the ground of this plaintiff, to wit: the said Pennsylvania Lode claim, for the purpose of extracting ores therefrom by reason of their ownership of the apices of any veins within their ground.

And this plaintiff further shows that the veins upon which the defendants have been extracting ore within the premises of this plaintiff, if they or any of them have their apices on defendants' ground, which plaintiff does not admit, do not in their course or strike depart from the end lines of the defendants' claims or possessions, but that the same depart from the side lines of such claims in such a manner as to prohibit the said defendants from

following the same beyond the said lines of their own possessions or claims, into plaintiff's portion of the said Pennsylvania claim.

That there are several veins which the defendants claim the right to follow on their dip beyond the side lines into the ground of this plaintiff, the Pennsylvania Lode claim, but that neither of the said veins in their course or strike depart from the end lines of the said claim- or possessions of the defendants, if they have their apices within defendants' premises at all, but plaintiff alleges that the ground claimed by the defendant was not so located or situated as to have any end lines whatever, as provided by the statutes of the United States in such cases and that in pursuance of such failure upon the part of the locator or locators of the ground or claims, owned or claimed by the defendants to mark the same with end lines parallel, or to locate the same along the veins, but on the contrary having located the same across the veins, the said defendants have no extralateral rights in or to any of the veins in their said ground, and are not entitled to follow the same into or upon
45 the ground of this plaintiff, the said portion of the Pennsylvania Lode claim.

And plaintiff further shows that a patent was issued by the United States to Stanislas E. Hirbour and others to that certain quartz lode claim, known as and called the Rarus Lode claim, hereinbefore referred to, a copy of which patent is hereto attached, marked Exhibit A and made a part of this complaint.

And plaintiff further shows that a patent has been granted by the United States to William Harris, Sr., and others for that certain quartz lode claim, known as and called the Johnstown Lode claim, a copy of which patent is hereto attached, marked Exhibit B and made a part of this complaint.

And as showing that the questions involved in this controversy are questions arising under the statutes of the United States, and involving the construction thereof, plaintiff shows and alleges that the said defendants herein claim to own a portion of the ground patented under both the said Johnstown and Rarus patents, and that by virtue of the said Rarus patent, they, the said defendants, have acquired 1318 linear feet of what is designated and called the Rarus lode, and it is contended by the said defendants that under and by virtue of the said Rarus patent they and their predecessors in interest were granted 1318 linear feet to the Rarus lode, extending from what is known as the east end line of the Rarus claim, to an imaginary or projected line of the Rarus location.

And plaintiff further shows that the surface ground patented to the predecessors in interest of defendants, to the Rarus Lode claim, does not include to exceed more than about three hundred feet of the said Rarus lode, as shown in yellow shading on the map, attached to the Rarus patent, but that notwithstanding the fact, that the surface ground granted by the said Rarus patent did not cover or extend over the said Rarus lode, the defendants contend
46 and claim that the said patent of the Rarus claim was granted to them and their predecessors in interest the said Rarus lode beyond the surface ground, granted by the Rarus patent and

to the full extent of 1318 linear feet, and also contend and claim that by reason of the ownership of the said lode for the length aforesaid, and that by reason of the fact that the same passes through the east end line of the Rarus claim, as patented, and the west end line of the original location of the said claim, that they are entitled to follow said veins on their course or dip into the earth and without the lines of the Rarus claim, both as originally located and as patented.

Plaintiff further shows that a large quantity of the ground which it is claimed by the defendant was originally included within the location of the Rarus claim has been patented under the said Johnstown patent, hereinbefore referred to and as shown by the portion shaded in yellow on the plat attached to the said Johnstown patent. That notwithstanding that a portion of the Rarus location was patented under the Johnstown claim, the defendants contend and claim that only the surface ground of the Johnstown claim was patented to the patentees therein named, and that all veins lying within the original location lines of the Rarus claim were patented to the claimant under the Rarus claim and that defendants are entitled to claim the said veins extending through the Johnstown patent under and by virtue of the Rarus patent, and that its extralateral rights should be determined by the Rarus and not by the Johnstown patent.

Plaintiff further shows that it disputes each and every one of the claims made by the defendants, relative to the construction of said several patents and claims that all veins whose apexes lie within the Johnstown patent must be governed and regulated in extralateral rights, if any they have, under the Johnstown patent and not under and by virtue of the Rarus patent.

47 And plaintiff further shows that the defendants claim that if they have no right to follow the veins within the lines of the original Rarus location, by virtue of the said Rarus patent, that they have a right to follow the same under and by virtue of the Johnstown patent or the Johnstown and Rarus patents combined, under and beneath that portion of the Pennsylvania Lode claim, belonging to this plaintiff; but opposed to this contention the plaintiff contends and insists that the defendants have no right to follow any vein having its apex either within the Johnstown or Rarus patents, under any circumstances into or under the Pennsylvania Lode claim. at any point east of the intersection of the south side line of the Johnstown patent with the south side line of the original Rarus location.

And plaintiff further shows that the said defendants contend and claim that the plaintiff cannot under any circumstances obtain any relief for ores extracted within that portion of the premises owned by it without first showing that the apexes of the veins from which the ores were extracted, are within the surface lines of the ground owned and claimed by the plaintiff, whereas, plaintiff claims that *prima facie* it is the owner of all ores found within its boundaries extended downward into the earth until it has been shown that some other person or company has some right thereto by reason of ownership of the apex of the vein within some other claim.

And plaintiff further shows that it is claimed by the defendants that the apex of the veins from which the ores in question were extracted, is divided, in that a portion thereof is claimed by the defendants as upon the Rarus Lode claim, and a portion thereof upon the Johnstown Lode claim, and a portion thereof upon the Pennsylvania Lode claim.

And defendants claim that by reason of the said divided apex that they may claim the right to follow the said vein beneath
48 the surface and without the lines of the Rarus and Johnstown claims, under and by virtue of either or both of the said claims at their election.

Plaintiff further alleges that if any such vein as is claimed by the defendants exists that they have no extralateral rights by reason of the fact that the same has a divided apex.

Wherefore plaintiff shows that there *is* involved in the matters in controversy, between the plaintiff and the said defendants the numerous questions aforesaid, which involve the construction of the statutes of the United States relative to locating, purchasing and patenting mineral lands, and the construction of such statutes relative to the right of one claimant to follow veins down to and into the premises of another, under the circumstances and situation of the parties as hereinbefore set out, and also the construction of such statutes in relation to patenting of claims, and whether the vein can be patented to one person and the surface to another, and to the right of the Land Department to segregate the surface from the mineral in the ground, granting one to one person and the other to another, and as to whether said action is authorized under and by virtue of said statutes, and also as to whether when an apex of a vein is divided upon the surface, part being within the premises granted in one patent, and a part within another, as to what, if any, extralateral rights are granted under such circumstances to either party.

Wherefore, plaintiff prays judgment against the defendants for the sum of five hundred thousand dollars and for costs of suit."

The court further certifies that upon the said amended complaint this court sustained said demurrer and entered its decree dismissing said action, holding that a Federal question was not pre-
49 sented by said allegations and that in consequence thereof there was no jurisdiction in this court in said action.

The court further certifies that the amount involved in said controversy, as shown by said amended complaint, is in excess of two thousand dollars, exclusive of interest and costs.

Done this 30 day of March, 1899.

HIRAM KNOWLES,
Judge of said Court.

Filed March 30, 1899.

GEO. W. SPROULE, *Clerk*,
By CHARLES W. BLAIR, *Dep. Clerk.*

And thereafter to wit, on the 16th day of March 1901, complainant filed its petition for a writ of error herein which is in the words and figures as follows, to wit,

50 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING Company, Complainant,
vs.
MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE, and Arthur P. Heinze, Defendants.

The Boston and Montana Consolidated Copper and Silver Mining Company, the plaintiff in the above-entitled cause, feeling itself aggrieved, by the order of the court, entered in the above-entitled cause on the 22nd day of March 1901, in sustaining the demurrer of the defendants to plaintiff's amended complaint, filed in said cause, and the order dismissing the said cause for the reason that the court had no jurisdiction over the parties or subject-matter set forth in the plaintiff's complaint, as will more fully appear by the certificate of jurisdiction filed in said cause, comes now by Forbis and Evans, its attorneys, and petitions the said court for an order allowing the said plaintiff to prosecute a writ of error to the honorable, the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided and also asks that an order be made fixing and allowing the amount of security which the plaintiff shall give and furnish upon the said writ of error. And your petitioner will ever pray.

FORBIS AND EVANS,
Attorneys for Plaintiff.

Service of the foregoing by copy is hereby acknowledged this 15th day of March 1901.

McHATTON AND COTTER,
Attorneys for Defendants.

51 Petition for writ of error. Filed and entered Mar. 16, 1901. Geo. W. Sproule, clerk.

And on said 16th day of March 1901 an order was duly made and entered allowing writ of error herein which is in the words and figures as follows, to wit:

52 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING Company, Plaintiff,
vs.
MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE, and Arthur P. Heinze, Defendants.

At the said term to wit: the February term A. D. 1901, of the circuit court of the United States of America, for the ninth circuit in and for the State and district of Montana, held at the court-room in the city of Butte, State of Montana, on the 16th day of March 1901:

Present: Hon. Hiram Knowles, district judge.

Upon the motion of Forbis and Evans, attorneys for the plaintiff, and upon the filing of the petition for a writ of error and assignment of errors:

It is ordered that a writ of error be and is hereby allowed to have reviewed in the Supreme Court of the United States the judgment heretofore entered herein dismissing the plaintiff's complaint and that the amount of bond on said writ of error be and is hereby fixed at five hundred dollars.

HIRAM KNOWLES, *Judge.*

Order allowing writ of error. Filed and entered Mar. 16 1901, Geo. W. Sproule, clerk.

And on said 16th day of March 1901 the complainant filed its assignment of errors herein which is in the words and figures as follows, to wit:

53 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING Company, Complainant,
vs.
MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE, and Arthur P. Heinze, Defendants.

Now comes the plaintiff in the above-entitled action and as-igns errors in the decision and judgment of the circuit court in said cause, as follows:

I.

The circuit court erred in sustaining the defendants' demurrer to the amended complaint of plaintiff herein.

II.

The circuit court erred in holding that the court had no jurisdiction of the subject-matter or parties in said action and in dismissing

the plaintiff's amended complaint and entering judgment for the defendants.

Wherefore the said plaintiff in error prays that the judgment of the said court be reversed and such directions be given that full force and efficiency may inure to the plaintiff by reason of its said cause of action, and that said cause of action may be prosecuted in the said circuit court.

FORBIS AND EVANS,
Attorneys for Plaintiff.

Service of the foregoing by copy is hereby acknowledged this 15th day of March 1901.

McHATTON AND COTTER,
Attorneys for Defendants.

Assignment of errors Filed and entered March 16–1901, Geo. W. Sproule, clerk.

54 And thereafter to wit, on the 16th day of March 1901, the complainant filed its bond on writ of error herein which is in the words and figures as follows, to wit:

55 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER Mining Company, Complainant,
vs
MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS Heinze, and Arthur P. Heinze, Defendants.
} No. 34.

Bond.

Know all men by these presents: that the Boston and Montana Consolidated Copper and Silver Mining Company as principal, and Alex Johnston and J. K. Heclet as sureties are held and firmly bound unto the Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze, the defendants named above, in the sum of five hundred dollars, to be paid to the said Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze, their successors, executors or administrators to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our executors, representatives and assigns firmly by these presents.

Sealed with our seals and dated this 15th day of March 1901.

Whereas, the above-named plaintiff, Boston and Montana Consolidated Copper and Silver Mining Company has sued out a writ of error to the Supreme Court of the United States to reverse the judgment in the above-entitled cause entered by the circuit court of the United States for the district of Montana.

Now therefore, the condition of this obligation is such that if the

above-named Boston and Montana Consolidated Copper and
56 Silver Mining Company shall prosecute said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void otherwise to remain in full force and effect.

ALEX J. JOHNSTON.
J. K. HESLET.

UNITED STATES OF AMERICA, }
State of Montana, County of Silver Bow, } *ss:*

Alex J. Joh-ston and J. K. Heslet sureties on the foregoing bond, being duly sworn, says, on oath, each for himself that he is a resident of the State of Montana, and a householder and worth the sum of five hundred dollars, over and above all his debts and liabilities and property exempt from execution in the State of Montana.

ALEX J. JOHNSTON.
J. K. HESLET.

Subscribed and sworn to before me this 15th day of March, 1901.

L. ORVIS EVANS,
Notary Public in and for the County of
[SEAL.] *Silver Bow, State of Montana.*

Sufficiency of sureties of foregoing obligation approved this 16 day of March 1901.

HIRAM KNOWLES, *Judge.*

Bond on appeal. Filed and entered Mar. 16, 1901. Geo. W. Sproule, clerk.

And thereafter to wit, on the 16th day of March 1901 a writ of error was duly issued herein which is hereto annexed.

57 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judge of the circuit court of the United States for the district of Montana, ninth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court before you between The Boston and Montana Consolidated Copper and Silver Mining Company, a corporation, plaintiff in said cause and plaintiff in error, and The Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze, defendants in said cause and defendants in error, a manifest error hath happened, to the great damage of the Boston and Montana Consolidated Copper and Silver Mining Company, plaintiff in error, as is said and appears by the petition herein. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done the parties aforesaid, in this behalf, do command, if judg-

ment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, on the 15th day of May, 1901, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court of the United States, may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16 day of March, 1901.

{Seal United States Circuit Court, District of Montana, Southern Division, 1892.}

GEO. W. SPROULE,
Clerk of the United States Circuit Court, Ninth Circuit, District of Montana.

Allowed by
HIRAM KNOWLES,
District Judge.

Service of this writ of error and receipt of a copy thereof is hereby admitted this 16th day of March, 1901.

JOHN J. McHATTON,
JOHN W. COTTER,
Attorneys for Defendants in Error.

58 [Endorsed:] 34. In U. S. court. B. & M. Con. C. & S. M. Co. *v.* Montana Ore P. Co. *et al.* Writ of error. Filed and entered Mar. 18 1901 Geo. W. Sproule, clerk, by T. B. Stephens, deputy clerk.

The Answer of the Judges of the Circuit Court of the United States, Ninth Circuit, District of Montana.

The record and all proceedings of the *plaintiff* wherein mention is within made with all things touching the same we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained in a certain schedule to this writ annexed as within we are commanded.

By the court:

[Seal United States Circuit Court, District of Montana, 1890.]

GEO. W. SPROULE, *Clerk.*

59 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Montana Ore Purchasing Company, F. Augustus Heinze, and Arthur P. Heinze, and their attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, within sixty days from the date of this writ, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the district of Montana, ninth circuit, wherein The Boston and Montana Consolidated Copper and Silver Mining Company, is plaintiff, and you are the defendants in error, to show cause, if any there be, why the judgment in said writ of error, mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Hiram Knowles, judge of the district court of the United States of America, for the district of Montana, this 16th day of March, A. D. 1901, and of the Independence of the United States the one hundred and twenty-fifth.

HIRAM KNOWLES,
United States District Judge, Presiding in the Circuit Court.

Attest:

{Seal United States Circuit Court, District of Montana, Southern Division, 1892.}

GEO. W. SPROULE, *Clerk.*

Service acknowledged and copy received this 16th day of March 1901.

JOHN J. McHATTON,
JOHN J. McHATTON,
Attorney for Defendants.

60 [Endorsed:] 34. In U. S. court. B. & M. Con. C. & S. M'g Co. *v.* M. O. P. Co. *et al.* Citation. Filed and entered Mar. 18 1901 Geo. W. Sproule, clerk. By T. B. Stephens, deputy clerk.

61 UNITED STATES OF AMERICA, *District of Montana,* } *ss:*

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

I, George W. Sproule, clerk of the United States circuit court for the district of Montana, do hereby certify and return to the honorable the Supreme Court of the United States, that the foregoing volume, consisting of 61 pages, numbered consecutively from 1 to 61 inclusive, is a true and correct transcript of the pleadings, certificate of question of jurisdiction orders, exhibits and other proceedings had in said cause and of the whole thereof, as appears

from the original records and files of said court in my possession; and I further certify and return that I have annexed to said transcript and included within said paging the original citation and writ of error.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Helena, in the district of Montana, this 6th day of May, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the 125th.

[Seal United States Circuit Court, District of Montana, 1890.]

GEO. W. SPROULE, *Clerk.*

Endorsed on cover: File No. 18,174. Montana C. C. U. S. Term No. 328. The Boston and Montana Consolidated Copper and Silver Mining Company, plaintiff in error, *vs.* The Montana Ore Purchasing Company, F. Augustus Heinze, & Arthur P. Heinze. Filed May 21, 1901.